RESPONSES

ALVIN BRONSTEIN*

At breakfast this morning, Norval Morris reminded me that he, not this panel, has the last word. But we have the penultimate word, and I'd like to make a comment about the entire proceedings before talking about litigation.

I think this colloquium and its focus on sentencing strategy has been fascinating but will have absolutely no impact on the prison overcrowding crisis. We have spent a lot of time talking about different sentencing strategies and their impact on crime. I think that is silly because no sentencing strategy will have an effect on crime, unless we decide to tell the police that they can lock up anyone they want based on any kind of suspicion, and then we just lock these people up for life. With that sentencing strategy we would have an impact on crime. But given the parameters of the Constitution, no sentencing strategy we could devise will have any real impact on crime. The problem is that these are essentially political and public policy issues, and the folks who make those decisions are not here. If the real goal were reducing prison population throughout the country by thirty or forty percent, and that's probably what it should be, the talent is here to do it; Norval and I decided we could do it in eight hours. We have all the statisticians, the academics, the research people, and the lawyers. We also have all the ideas, a combination of sentencing reform, release mechanisms, alternatives—we could reduce prison population by a third. But that's not what the public policymakers want—the legislators, the governors. They're not here and they're not going to listen to anything that comes out of this conference. In fact, I think they would probably be happier if they could double the prison population rather than reduce it—if they could afford the prisons and find the locales to take them.

The reality is that we lock up too many people in this country and keep them locked up for too long a time. The people who make those decisions, the politicians, want more of the same. What's left then, it seems to me, is institutional litigation, which is what this panel is all about. I don't plan to

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spend much time talking about *Rhodes*[1] and *Wolfish*.[2] I don't think what the Supreme Court has done or hasn't done is that important.

This morning Tony Travisono talked about baseball, about the fact that I had this big collection of baseball bats, and that the correctional administrators' heads were the baseballs. People who know our office know that we're not like that. We don't sit around at our meetings planning new litigation, and talking about batting the administrators' heads in, we just make a decision to sue the bastards.

Litigation, which I'm now proposing as the only rational way to do something about prison overcrowding, is not, of course, the real answer; it's not going to solve all or most of our population problems. It may, in fact, result in prison expansion. We try to prevent that whenever possible, but sometimes it happens. Litigation, however, can and has improved conditions. It improves the quality of life for prisoners, and more than anything else except riots like the Attica and New Mexico episodes, it exposes the sordid conditions in our prisons to public scrutiny. And I think that's worth doing.

Before talking specifically about institutional litigation, I do want to respond to one point Susan Herman was making at the end of her presentation. Based upon our experience, I want to caution people about state court litigation. We tried it in 1977 in Tennessee at the urging of our local counsel—they told us that the state courts would be more receptive than the federal courts there, that the State Supreme Court was better than the Sixth Circuit, and so we tried it. We had a statewide conditions case before a chancellor who had state-wide jurisdiction and we got a marvelous opinion in a case called *Trigg v. Blanton*.[3] The trial court found the entire state prison system unconstitutional, appointed a master, and issued a detailed remedial decree that was immediately stayed by the Tennessee Court of Appeals.[4] They sat on the case for two years, and then issued a bizarre opinion saying: We don't understand this class action business, and we don't think it's appropriate. If the Chancellor thinks there are medical problems, never mind this pattern and practice of serious and willful neglect of serious medical problems, take the testimony of particular prisoners who have suffered as a result of medical neglect, and provide relief for them. We don't understand this business about pattern and practice of violence and assaults; hear the testimony of individual prisoners, and if somebody has been subjected to violence, provide a remedy for that person.[5] They remanded the case for what could have been, I figured, a fourteen-year trial.

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1. Rhodes v. Chapman, 452 U.S. 337 (1981).
2. Bell v. Wolfish, 441 U.S. 520 (1979).
3. Trigg v. Blanton, No. A-6047 (Ch. Ct. of Davidson County, Tenn. Aug. 23, 1978).
4. Trigg v. Blanton, No. A-6047-I (Tenn. Ct. App. Oct. 4, 1978).
5. Trigg v. Alexander, No. A-6047-I (Tenn. Ct. App. May 1, 1980).

We appealed to the Tennessee Supreme Court, whose make-up had by this time changed as the result of death and new appointments; they sat on the case for a year, then decided that they would grant certiorari.[6] We filed briefs. Then, four years later, in 1981, United States District Judge Morton in Tennessee decided that things had gone on too long, and that he was getting all the same complaints from prisoners. The state courts did not seem to be doing anything. He appointed our local counsel, and then us, to represent some *pro se* prisoners who had filed a state-wide challenge to the conditions of confinement in Tennessee. Thereupon the Tennessee Supreme Court issued an opinion noting Judge Morton's action, and said they would abstain.[7] To my knowledge, that is the only state supreme court decision in which the state court abstained in favor of the federal court. We tried the case all over again before Judge Morton, and won the second time. The judge found that the entire state prison system was unconstitutional based on federal law, although he did make some references on the pendant jurisdiction of state law; he commented tongue in cheek about the abstention of the state court.[8] I'm afraid we've been badly burned by our state court experience.

I do think that some changes are necessary in institutional conditions litigation. That is not so much because of *Wolfish* or *Chapman*, but because of things that we ourselves have done. Litigators like Will Hellerstein and Bill Turner and myself with our respective offices have probably created more problems in this area than either *Wolfish* or *Chapman* by going after, and obtaining, sweeping and detailed remedial decrees involving due process and recreation and literature and the kinds of T.V. allowed in cells, and whether or not prisoners get footlockers of their own, and whether or not the state provides toothbrushes. We've gotten those kinds of decrees—if you've seen the *Ruiz*[9] decree or the Rhode Island decree in *Palmigiano*,[10] or the Alabama decree in the *Locke-Newman-Pugh* trilogy,[11] they go into enormous detail. They raise the levels of prisoner expectations because those very details are extremely important to prisoners in their daily lives. The problem is that we raise their expectations on things that are very difficult to monitor and enforce, and it's those kinds of things that stick in the craw of the correctional administrators and the legislators and the politicians.

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6. Trigg v. Alexander, No. 81-2-I (Sup. Ct. of Tenn. Jan. 12, 1981).
7. Trigg v. Alexander, No. 81-2-I (Sup. Ct. of Tenn. July 2, 1981).
8. Grubbs v. Bradley, 552 F. Supp. 1052, 1057 (M.D. Tenn. 1982).
9. Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part,* 679 F.2d 1115 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 452 (1983), *modified on rehearing,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 1438 (1983).
10. Palmigiano v. Giarrahy, 443 F. Supp. 956 (D.R.I. 1977).
11. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd and remanded sub. nom.,* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds,* Alabama v. Pugh, 438 U.S. 781 (1978).

I recall a meeting last year at the National Association of State Attorneys General. The attorney general from Indiana spoke about the two federal court decisions there—one dealing with the penitentiary in Michigan City,[12] the other with the reformatory at Pendleton.[13] In the former case, the federal judge issued a fairly narrow decree dealing with medical care and overcrowding.[14] The state felt that he was right—they were going to comply with it as best they could. But Judge Dillon, in the reformatory case, issued a very detailed decree telling them how many medical technicians they had to hire, and so on and so forth.[15] They were going to fight that one to the end because they didn't want to be told in detail how to do every single thing in their prison in Pendleton.

What we need to do now is to narrow our focus, and concentrate on the four major issues which are fundamental to the life, health, and safety of prisoners. The first is clearly overcrowding. The way a person lives, the amount of space a person has, is a fundamental issue. The second is environmental health and safety—sanitation, fire safety, whether there are cross connections in the plumbing—those things can be life-threatening. Third, there is personal safety—a prisoner, it seems to us, ought to have the right to be safe. Primarily, problems arise in the form of threats from other prisoners, but there are also threats from correctional officers. That's a fundamental issue. Prisoners ought not to have to worry about dying, being stabbed, being assaulted, or being raped. And fourth, there is medical and mental health care. Those four issues—overcrowding, environmental health and safety, personal security, and medical and mental health care—are the issues that we ought to be focusing on and narrowing our cases to address.

I think these issues are easier to enforce and monitor than others—they're almost self-reporting. It is very difficult, for example, to monitor a decision dealing with disciplinary due process, or whether there is interference with literature or mail. It involves enormous fact-finding and is very time consuming. On the other hand, a population limit is relatively easy to enforce. Prison officials don't lie about their population. When you go into any prison, the first thing you will see in the sergeant's office is the count board, which will tell you exactly how many prisoners are there that day. The prison officials will tell you about the count monthly or quarterly; they don't lie about that, and so it's easy to find out whether they're in violation. I think if we focus on these four issues we won't be raising prisoners' expectations about problems we can't solve, we won't be making promises we can't keep.

Furthermore, I think focusing on these four issues is understandable and acceptable to administrators. They understand that they have to run a

12. Hendrix v. Faulkner, 525 F. Supp. 435 (N.D. Ind. 1981).
13. French v. Owens, 538 F. Supp. 910 (N.D. Ind. 1982).
14. *Hendrix,* 525 F. Supp. at 435.
15. *French,* 538 F. Supp. at 910.

safe, secure prison, and they can live with it. When I go to Rhode Island now, they proudly show me the stairwell, which is the second means of egress from the upper cell blocks. The stairway, by the way, is called the ACLU memorial stairway. They proudly show me the exhaust fans which pull out all the smoke from the cell block within two and a half minutes which means that people will not be asphyxiated. They understand this kind of improvement, they can deal with it, and they can live with it. Most of them want it, and it's not something that grinds at them like telling them what kind of educational background their counselors should have.

I think we can have an impact on important life and death, or life, health and safety issues for prisoners. By focusing our cases we can ultimately get more bang for our bucks—I think we can do more cases and we can be in and out of states more quickly. In short, we can spread our relatively thin resources around the country more than we're doing today.

We cannot give prisoners the rose garden that, as that distinguished defender of individual rights and liberties, Mr. Justice Rhenquist reminds us, was never promised to them. But I think we can remove them from the filth and degradation and inhumanity that typifies so many of our jails and prisons. Whether or not we can have a long term impact on overcrowding, that much is worth doing.

WILLIAM BENNETT TURNER*

It's nice of NYU to invite us tired old refugees from the 1960s to speak at this conference. After all our experience in litigation, we probably don't have any more answers now than we did back then when this whole area of the law was first opened.

Let me speak about Texas, because that's the system that I know best. If Texas can be considered a leader in the corrections field—as many state legislators around the country think it is—let me give you a chilling picture of what is to come. Texas is the antithesis of a selective incapacitation state. It is, of course, the largest prison system in the country, significantly larger than California or New York, or even the Federal Bureau of Prisons. There are now over 37,000 prisoners in Texas.[1] They have a net gain of as many as 500 prisoners a month and that amounts to a need for about one prison a month to accommodate the influx. Texas is also the cheapest prison system in the country, and that is of course its appeal to state legislators elsewhere. It spends less per prisoner than any other system. It has the lowest staff to prisoner ratio of any system in the country. The Abt report, American Prisons and Jails, found that it was in "a class by itself."[2] It was almost off the chart in having so few staff for so many prisoners. It is also the most crowded prison system, with more prisoners in less square feet than anywhere else. The standard accommodation in Texas is a nine-by-five cell—with every general population cell a double cell. The system now has about 4,000 prisoners living in tents.[3] That idea is spreading, and in California they are, as we sit here today, erecting a thousand tents at San Quentin. Texas incarcerates more nonviolent offenders than any other system. Well over half of the prison population in Texas is serving time for an offense not involving violence.[4] Over 60% of the new prisoners sent to Huntsville each year are first offenders.[5] This situation exists even after the court order in *Ruiz v. Estelle* found the Texas prison system to be cruel and unusual.[6] The court order has proven to be ineffectual, largely because of the *Chapman* case.[7] The district court decided *Ruiz* before *Chapman* came down. The state appealed, and the Fifth Circuit, relying on *Chapman*, reversed the

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1. Defendant's Report on Population and Housing, Ruiz v. Estelle, No. H-78-987 (S.D. Tex. May 2, 1983).

2. 3 NATIONAL INSTITUTE OF JUSTICE, AMERICAN PRISONS AND JAILS 108, 118 (1980).

3. Defendant's Report on Population and Housing, *supra* note 1.

4. TEXAS DEPARTMENT OF CORRECTIONS, ANNUAL STATISTICAL REPORT 33 (1982).

5. *Id.* at 38-39.

6. Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part,* 679 F.2d 1115 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 452 (1983), *modified on rehearing,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 1438 (1983).

7. Rhodes v. Chapman, 452 U.S. 337 (1981).

most important, most easily enforceable remedy that the district court had imposed: you can't put two prisoners in little cells designed for one.[8] And the Fifth Circuit did that on the basis of *Chapman*, which of course is easily distinguishable on its facts: the prison in Ohio was brand new, and there were lots of tolerable things about it compared to the prisons in Texas. At the time of trial Texas had three prisoners in little cells, one sleeping on the floor with his head next to the toilet. So, *Chapman* was easily distinguishable on its facts. But the message that came out of *Chapman* to all of the lower courts was twofold. First, I think the court passed up a golden opportunity to do something to limit prison population by reference to design capacity. It would have been very simple to establish overcapacity as at least a presumptive basis for unconstitutionality—when you're over capacity, we're not going to allow it. The only effective remedy for overcrowding in my view is an easily defined capacity. The second message that the Supreme Court sent out was a reaffirmation of "hands-off," or deference to state officials, or federalism, or comity, or whatever label you want to put on it. In the sixties when we started litigating about prisons, most federal courts were parroting the "hands-off" slogan. The usual formulation of the slogan was that the courts lacked "jurisdiction" to inquire into prison conditions.[9] But it's not a jurisdictional question at all, and that was finally straightened out.[10] What we now have, however, is "hands-off" through the back door—hands-off on the merits, thus narrowly restricting the scope of the constitutional right involved.

It's ironic that the "hands-off" message came out on the issue of overcrowding. I think that, as Susan Herman perceptively said, this is the issue where there is the least claim to deference. Nowhere is it a state policy that prisons should be overcrowded. As Susan put it, "why defer to a default?"

In Texas, we do have a second bite at the apple. The Fifth Circuit said that they would reverse or vacate the order that Texas go to single cells.[11] They referred to what the cost of providing single cells for those who had been double celled would be. The conservative estimate was $300 million.[12] The Fifth Circuit said that they'd wait and see for a year whether the state complies with all the other relief that they affirmed—on medical care, on

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8. *Ruiz*, 679 F.2d at 1146-47.

9. *See* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 508 n.12 (1963); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 & n.2, 508 (1971).

10. *See generally* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 93 HARV. L. REV. 610 (1979).

11. *Ruiz*, 679 F.2d at 1164.

12. *Id.* at 1146-47.

staff, on classification and so on—and then see if the totality of conditions has changed to the extent that it's no longer necessary to have such a drastic and costly remedy as the trial court imposed.[13] Mark White, then attorney general, now governor of Texas, framed the issue. He said that there's no constitutional right to "private rooms for prisoners." That's a catchy slogan, but it's the wrong way to look at the issue.

We ought not cast the issue in terms of right to a single cell, or right not to be double celled. That's just a question of remedy. The right involved is the right not to be confined in egregiously overcrowded conditions. When we go back to the district court in Texas in the fall, we will prove that the system is more crowded now than it was at the time of trial. There's significantly less bed space now considering the size of the population. Sure, there are no longer a thousand prisoners on the floor, the way there were at the time of trial. But there are four thousand in tents. And there are more than ten thousand new prisoners. What's lacking are the common facilities to accommodate any of them—the kitchens, the recreational facilities, the day rooms, the jobs, the schools—none of that has been increased since the time of trial. In addition, because they are overwhelmed with all these new prisoners, they are even less able to meet prisoners' basic needs for medical care, safety, and so on.

Let me say a more pessimistic word than Al Bronstein about the use of litigation as a tool, especially in conditions cases. I think litigation is effective in what I see as civil liberties cases, such as those dealing with censorship or procedural due process. In those cases the state's defense is prison security. The claim is exaggerated and the remedy does not cost the state any more money; in fact, it may save the state money because the state won't have to pay for guards reading prisoners' letters to their moms. But in prison conditions cases, the defense is lack of resources. The remedy is basically money, appropriations from the legislature.

I think there are risks in conditions cases that are not posed in civil liberties cases. First, there's the risk that as a result of your litigation, you will have erected shiny new prisons, which, as the Abt study showed us, will immediately be filled up and overcrowded.[14] I consider the building of a new prison a major defeat in a prison conditions case.

The second risk is that by improving prison conditions (and I certainly agree that they are inhumane and that they need improving), we may legitimate the institution of imprisonment as we know it. I think it's a question that hasn't been answered: are prisons more crowded now, as a *result* of litigation, or less crowded? I don't know the answer.

I do think, and I explicitly use this as a strategy, that is is worth trying to improve the conditions of imprisonment and thereby to make it ruinously

13. *Id.* at 1148.
14. *See generally* AMERICAN PRISONS AND JAILS, *supra* note 2.

expensive for the state to continue to incarcerate as many people as they do. They really do have to have doctors, instead of prisoners, rendering medical care; they really do have to have guards to keep the peace, and not rely on prisoner guards. The taxpayers are not going to foot the bill for this. I think the only real hope for dealing with overcrowded conditions around the country is an appeal to fiscal conservatives. This year the Texas Department of Corrections went to the legislature with a proposed budget of 1.5 billion dollars and for the first time in Texas, the legislature is seriously considering alternatives to incarceration. The fiscal conservatives, to the extent that we can build coalitions with them, may be the first effective prison reformers.

VINCENT M. NATHAN*

As Will Hellerstein in his introduction correctly pointed out, I am not a prison litigator. Susan Herman, on the other hand, in describing herself as the only academician on the podium, unwittingly disposed of twenty years of my life and career. I taught commercial law, corporate bankruptcy and similar subjects for about that period of time. I rapidly and humbly acknowledge, however, that nothing in that experience prepared me for today's presentation. From a substantive point of view, therefore, her comment was quite accurate. Your printed program, on the other hand, describes me as the "Master" of the Georgia and Texas prison systems. That description, I must acknowledge, carries certain connotations I must decline to accept. So perhaps I should begin by telling you, who, in fact, I am.

I am an attorney who has spent the past nine years of his life serving as special master for several United States district court judges in litigation involving, in three instances, prisons and, in one instance, a county jail. The cases in which I have been involved have ranged from single institution cases to *Ruiz v. Estelle*[1] which is, I suppose, the King Kong of all such endeavors. That mastership encompasses twenty-eight prisons and more than 35,000 prisoners. My Houston office is comprised of six attorneys, four support staff, and all the accoutrements that are typically associated with a law firm.

Before turning to the subject of the role of masters and their possible effectiveness in the remedial stage of institutional reform litigation, let me take a moment to make a couple of comments in response to what earlier speakers on this panel have said. I appreciate the force of Al Bronstein's observations that overcrowding, environmental health and safety issues, personal safety, and medical and mental health constitute a core of critical issues to be addressed by correctional administrators, by litigation, and by all other elements of the reform movement. I raise the question, however, whether a prison that is not perceived as being a fair institution can ever be a safe one. Thus, I suggest that due process issues relating to discipline, to loss of good time, to assignment to administrative segregation, and to transfer to more punitive circumstances of incarceration may indeed be as important as those mentioned by Al. They are closely related to prisoners' perceptions of their environment and to the frustration, tension and anger that are commonplace in many prison populations. For this reason, I believe that they are integral to the fundamental issue of safety.

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1. 679 F.2d 1115 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 452 (1983), *modified on reh'g,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 1438 (1983).

In my opinion, the best description of what a prison should and must be was offered by my good friend, John Conrad. He said that a prison must be lawful, that it must be safe, that it must be industrious, and that it must be hopeful.[2] I am not certain that it can be any of those things unless it is all of them. The due process issues to which I have alluded constitute an essential element of lawfulness and thus, in my opinion, contribute directly to the other critical elements set forth by Mr. Conrad.

Further, in response to other comments that have been made, I think that it is important to realize that the problems of a prison that require reform, that require intervention by a court or correctional administrators, are interrelated to such an extent that it is difficult to single out specific issues, direct curative efforts toward them, and then expect any kind of fundamental change in the environment of the institution. The degree to which a prison is safe has an effect upon its ability to deliver medical care, and to provide other fundamental services and programming. Likewise, the extent to which a prison is dirty obviously affects the quality of medical care, food service, and other services, the self-image of prisoners, and their willingness to obey disciplinary rules. It seems to me that a prison, as much as any other social institution, is a seamless web, and that courts, litigators and correctional administrators who believe that problems can be solved *seriatim* very often find themselves making little progress toward overall institutional reform.

In light of the patience you have demonstrated over the past two days, I shall try to take just a few moments of your time to discuss the phenomenon of special masters and their role in prison reform. I hope some of my observations and comments will provoke your curiosity and perhaps later, questions. The role of litigation has been discussed today at some length. No one here would deny that it is an important, if not a centrally important, factor in the overall picture of prison reform today. I think all of us acknowledge as well, however, that litigation is not a total solution. Even when successful, it does not result in a self-executing decree or a remedial order that can be easily enforced. The process is not as simple as the mere service of the appropriate summons on a sheriff for execution or garnishment. In virtually all instances, we are dealing with complex mandatory injunctions that are by no means self-executing, whether they are of the general type described by some of the earlier speakers, or of the detailed and specific nature discussed by others. Courts and litigators have found, and certainly prisoners have learned, that the achievement of victory in the courtroom, however heady that victory may be, does not translate automatically or even necessarily into meaningful substantive change within the institution or system.

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2. J. Conrad, *Ending the Drift and Returning to Duty: Two Scenarios for the Future of Corrections,* Proceedings of the Congress of Corrections (1981).

One of the means selected by some litigators and ultimately by some judges to effectuate change in response to remedial decrees has been the appointment of special masters. That is the role I am filling in Texas and in Georgia at this time. A special master is an agent of the court, appointed in many instances under Rule 53 of the Federal Rules of Civil Procedure. I have argued, and the Fifth Circuit has agreed, that such an appointment is also within the inherent authority of a court of equity to appoint agents to provide assistance in the conduct of the court's judicial business.[3] The phenomenon is certainly a growing one. Masters have been appointed in a significant number of prison and jail reform cases.[4]

The scope of the order of reference in cases in which masters have been appointed has varied. In some instances, the master's role has been limited to monitoring and fact-finding. In others, it has included drafting of compliance plans and providing overall direction and guidance to compliance efforts.[5]

Masterships have been limited to single issues in single institutions where special expertise or monitoring skills were needed.[6] They have also been used in totality cases affecting a single institution,[7] and in cases like *Ruiz,* in which numerous facets of the operation of a vast prison system have been within the scope of the mastering process. The master's objective is to bring about the implementation of the court's decree and thereby terminate the active phase of the remedial litigation. The master's loyalties, therefore, are to the court and the order it has issued. The process of implementing change, however, is not as simple as it might appear to be on the surface. In addition to observing, monitoring, and reporting—the obvious duties of a master—my own experience has shown that the translation of a remedial decree into operational terms and standards approved by all the parties, understood by the defendants, feasible to implement, and susceptible to reasonably objective monitoring may be the master's central contribution in complex cases. The master's role, therefore, may be one of mediating and negotiating and even, to some extent, of drafting policy statements, procedures, and agreements that will translate the court's order into language with which the parties are able and willing to live. There are other functions that are even less obvious. For example, a master may make an effort to obtain and to coordinate resources, both financial and human, in order to bring about compliance. The master may also have the task of identifying and bringing into the mainstream of the litigation process, or at

3. *Ruiz,* 679 F.2d at 1161.

4. See cases cited in Nathan, *The Use of Masters in Institutional Reform Litigation,* 10 TOL. L. REV. 419, 422 nn.33&34 (1979).

5. *Id.* at 450-54.

6. Costello v. Wainwright, 387 F. Supp. 324 (M.D. Fla. 1973) (court appointed a special master to help it evaluate medical services and health care in the prison).

7. Taylor v. Perini, 413 F. Supp. 189 (N.D. Ohio 1976).

least the reform process, some of the "hidden defendants" who have been talked about at various points over the past couple of days. Legislative and executive leaders are in effect unnamed defendants who hold the power to effectuate or to obstruct change. Finally, the master's function, in at least some instances, may be to attempt to dissipate the hostility, frustration, and anger that frequently characterize the relationship of counsel at the end of bitterly fought litigation that has been lost by at least one side, and sometimes, in the view of the parties, by both sides. In the same vein, the master may serve as a salve to soothe relationships between all or some of the parties and the court itself. The court, it should be noted, after years of litigation and, in some instances, of noncompliance following remedial decrees, often finds itself relatively short-tempered.

These are only some of the ways in which we who have served as masters spend our days. There is much more that could be said about masters and the mastering process. As I have suggested before, a master may be appointed at one of several stages in the litigation. Judges have appointed masters before issuing remedial decrees. Even before making any findings of liability, they have appointed fact-finding masters, who fall squarely within the traditional scope of Rule 53. The most common situation, however, has been the appointment of a master after the issuance of a remedial decree, and generally, after some significant time has passed without the achievement of compliance by the defendants. *Ruiz* was important from the point of view of the law of mastering because the Fifth Circuit squarely confronted the question of the propriety of appointing a master before the defendants have been given an opportunity to achieve compliance with the remedial order. The argument that the appointment was premature did not deter the court, and it affirmed the mastership.[8]

In conclusion, let me say that the litigation process, as I have observed it, and as others much more familiar with it than I have observed it, does not promise automatic, instantaneous, or even reasonably prompt change within the prison or system against which the litigation is directed. Anyone measuring the phenomenon of mastering from an empirical point of view would certainly not be able to say that the appointment of a master guarantees the achievement of an adequate degree of institutional reform or change in response to a remedial decree. The use of a master is one device, but by no means the only device, to which judges and lawyers are turning in an effort to translate a remedial decree into tangible reform. I believe, however, that those who are involved in the process, whether they are judges, litigators or masters, are becoming increasingly confident that the use of such an agent can be expected to facilitate and expedite change. In addition,

8. *Ruiz*, 679 F.2d at 1160-61 ("Moreover, the [district] court was not required to await the failure or refusal of TDC [Texas Department of Corrections] to comply with the decree before appointing an agent to implement it. Noncompliance may constitute one 'exceptional condition' under Rule 53, but it is not exclusive.") (footnote omitted).

they see that a master can promote the process of negotiation and compromise which, while generally not thought to be necessary after a lawsuit has been won, seems to me to be of central importance in bringing about real change in prisons once the active litigation phase of a lawsuit has ended.

The phenomenon of mastering is a complex one that does not fit easily within traditional notions of the judicial role in instititutional litigation. In some respects, it is a process that raises at least as many questions as it answers. It is, in my opinion, at least, one that offers some promise for translating remedial decrees, achieved either through compromise or through hard fought litigation, into the reality of change that is the objective prisoners are seeking to obtain through application of the legal process.

WILLIAM C. COLLINS*

Just as Bill thanked the *Review* for bringing a tired old liberal from the sixties here, I would like to thank them for bringing a tired old assistant attorney general from the seventies here. It's been a delight for me, particularly since I am not a frequent denizen of New York City.

I was chief defense counsel in *Hoptowit v. Ray,*[1] one of the cases referred to by Susan. To some, the case is an aberration; to some it's brilliant judicial insight. The case did reject the totality approach, although there is some cryptic language to suggest that it's still floating around in the background.[2] It also embraced the concept of basic human needs as an approach to evaluating eighth amendment claims, and in that respect I think it's consistent with cases from other jurisdictions.[3]

Speaking from the state's point of view, I have a couple of observations. Representing the state in one conditions case seems to make an assistant attorney general an expert, whereas Mr. Bronstein and Mr. Turner have countless conditions cases under their belts. I think it's also indicative that there are two plaintiffs' attorneys at the table and only one state's attorney. I suggest that that is typical of the resources that states often commit to the defense of a prison case. Typically, the plaintiff's side is far better represented, both in terms of the quality and the quantity of the attorneys that are involved. The idea that the state has limitless resources to bring to bear in these cases does not typically reflect reality.

I think we're ahead of one panel yesterday, because I can already agree with Al Bronstein on one point and with Bill Turner on another point. I agree with Al Bronstein's comment that sentencing strategies are not going to have an impact on crime, nor are they going to have a particular impact on prison crowding; whatever conceptual approach to sentencing a state adopts, it is the numbers that it plugs into the concept that are critical, not the concept itself. I also agree with Bill Turner that the key to getting prison

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1. 682 F.2d 1237 (9th Cir. 1982).

2. *Id.* at 1246-47.

3. *Id.* at 1246. *See also* Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981); Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978), *rev'd on other grounds sub nom.*, Bell v. Wolfish, 441 U.S. 520 (1979); Newman v. Alabama, 559 F.2d 283, 286 (5th Cir. 1977), *cert. denied,* 438 U.S. 915 (1978).

populations down to manageable levels is probably going to be simply one of money. Legislators and the public have to be told that a new prison of a thousand beds not only is going to cost *X* million dollars to build but is also going to cost ten times *X* million dollars to run for the life of the institution. Sometimes convincing legislators of the total dollar impact before an institution is built will convince them to look at other alternatives. It is very hard, however, to explain to the parents that we can't afford to jail the drunk driver who killed their daughter in a hit-and-run accident. The collective solution doesn't play out well in individual cases.

Now let me turn to litigation. There is no question that the involvement of the courts has brought corrections' feet to the fire, and that court intervention has probably been the factor most responsible for motivating positive change in prison operation and management in the last fifteen years. Direct judicial involvement may have a limited effect in the conditions/crowding area. If you look at the length of some of the cases, Alabama, Arkansas and Rhode Island, for example,[4] you wonder if the court orders produced the change that people thought they would when the cases began or when the orders were first issued.

I would suggest, however, that the *threat* of judicial intervention may well be a better motivating factor than the actual court order. Legislators and administrators seem to be better able to respond to the threat of being sued if they don't do something, than to respond positively once they are sued and an order is entered, particularly the all-encompassing order typical in a major conditions case. The "Big Order" provokes a negative reaction; heels dig in and progress stops. The order frequently operates in opposition to public opinion, which may equate prison reform with the "country club prisons" of media mythology. Administrators as a rule simply don't like to run their institutions with the thought that virtually every decision they make may have to be justified to a judge someplace through more litigation, more discovery, more attorneys, and more going off to court to be a witness rather than being a warden.

I think I see the courts moving the fire away from the feet of corrections. Population levels *per se* are becoming almost irrelevant in overcrowding cases. You won't talk about "overcrowding" cases as much as you'll talk about "conditions" cases, because the conditions that exist in the institutions will be what determines whether or not the eighth amendment has been violated. Basic human needs, the approach taken by the Ninth Circuit, and alluded to in the Second and Fifth Circuits,[5] is, I think, going to

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4. E.g., Hutto v. Finney, 437 U.S. 678 (1978); David v. Travisono, 621 F.2d 464 (1st Cir. 1980); Newman v. Alabama, 559 F.2d at 283. All three cases were more than a decade in length.

5. *Hoptowit,* 682 F.2d at 1246; Wolfish v. Levi, 573 F.2d at 125; Newman v. Alabama, 559 F.2d at 286.

become the courts' focus. Basic human needs can be met in a seriously overcrowded prison by doing things other than simply releasing a lot of people. More staff can be added, more controls can be imposed, stronger management can be brought to bear. In part, these solutions are the legacy of the litigation threat, and they carry with them a certain irony: the state may "win" the case by defending the overcrowded prison, yet in a sense lose the war, by removing the motivating factor for getting the population down. If a prison has been established as constitutional, albeit overcrowded, a legislature may refuse to spend more for new beds or to approve new diversion techniques whereas such actions may be taken quickly if a threatened court order lurks in the background.

Courts are also reducing the scope of what can be called cruel and unusual punishment. The Supreme Court's rejection of various sets of professional association standards as guides to constitutional minima is indicative of this.[6] The *Chapman* court says the eighth amendment is violated by a "wanton infliction of pain."[7] That doesn't tell me, as counsel to a state agency, very much; it makes it difficult to advise my client as to when the eighth amendment is violated. However, similar problems exist with other eighth amendment tests such as "shock the conscience" or "violate evolving standards of decency." It's much easier to say the eighth amendment is violated when the population exceeds 120% of capacity than it is to try to decide when pain is being wantonly inflicted on people in an institution. Nevertheless, that seems to me to be where the test is going. The courts will focus more on quantifying the effect of the deficiency on the prisoner rather than on simply holding the deficiency up against a standard.

At the same time that the length and breadth of the eighth amendment are diminishing, the scope of the relief is narrowing. In the past, once a violation had been found, the courts were relatively free to devise whatever remedy they chose.[8] Now courts are saying that the scope of remedy should be limited to no more than curing the specific constitutional violations and that at least with the first remedial order, the relief should be "the least instrusive that will still be effective."[9] If a court is using a basic human

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6. In Rhodes v. Chapman, 452 U.S. 337 (1981), and in Bell v. Wolfish, 441 U.S. at 543-544 & 543 n.27, the Court put an end to a growing trend among lower courts to use standards developed by various professional associations as guidelines in determining eighth amendment violations. The *effect* of a given condition on the inmate, not whether particular standards are violated, is the critical determination that must be made. *Chapman,* 452 U.S. at 348-49.

7. 452 U.S. at 346 (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

8. One Texas District Court ordered a jail diet to include daily servings of one fresh green vegetable and one fresh yellow vegetable. This was reversed on appeal as being too restrictive. Smith v. Sullivan, 553 F.2d 373 (5th Cir. 1977).

9. Ruiz v. Estelle, 679 F.2d 1115, 1145 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 452 (1983), *modified on reh'g,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 1438 (1983). *See also Hoptowit,* 682 F.2d at 1247.

needs test, and particularly if each of those needs is viewed more or less independently of one another, as the Ninth Circuit suggests,[10] relief will be far less sweeping than that which we've seen in the past. The court no longer can reach every factor in the institution it deems to have contributed to the violation.

Continuing violations, on the other hand, may support more extensive forms of relief.[11] With the basic human needs approach, curing the problems of a cruel and unusual prison does not necessarily mean reducing population. If a medical system is deficient, put more doctors in it. Build a bigger kitchen to improve food service. Control inmate movement to cut down on violence, or have more shakedowns. There are a variety of management techniques that can help an overcrowded prison meet basic human needs.

Whatever form the court order may take, the key to relief will be commitment by defendants to comply with the letter and the spirit of the order. The success of those cases we have seen resolved resulted from the defendants deciding, "Okay, it's time to stop fighting everything. Let's get with it, let's do it right, and we can end this case."[12] Without that cooperation, the cases just drag on and on and on.

I've mentioned a couple of the problems that a state attorney has. It is virtually impossible for me to tell a legislative committee, or a director of corrections, for example, when an institution has crossed the line and become unconstitutional. How many people can the prison hold? I have to respond, "Well, that depends." It's not the sort of specificity they're looking for. This uncertainty makes it easier for a legislature to duck away from corrections issues, to put them back on the same plate with those of all the other groups that are clamouring for more money. And to an extent, that is unfortunate, because, historically, when corrections competes with other government agencies for tax dollars, corrections comes in last.

A second problem is that sometimes the client wants to lose, since sometimes losing is the only way a correctional administrator can get the money he needs to run a proper program. But if losing becomes more difficult as courts contract the definition of cruel and unusual punishment, then political, and not judicial, processes become more significant. How those political processes can be made to respond to the needs of corrections is a question I can't answer, particularly if the threat of litigation is being pulled away. The legislative appropriation, made to meet the demands of a court order or to clear the threat of one, may disappear if the appropriation request is based on "mere" policy reasons, instead of on the threat that a judge may close the state prison.

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10. *Hoptowit,* 682 F.2d at 1247.
11. Hutto v. Finney, 437 U.S. at 687; *Hoptowit,* 682 F.2d at 1247.
12. Finney v. Mabry, 546 F. Supp. 628, 642 (E.D. Ark. 1982).

I have another comment about remedies. The situation in the Alabama litigation struck me as interesting. The district court had ordered that several hundred specific inmates be released from the Alabama systems following a finding that Alabama had failed to comply with a consent decree. The circuit court reversed, holding that the order was too intrusive, and that the district court should have relied on its traditional contempt powers and considered imposing fines or throwing the commissioner of corrections in jail.[13] I have some doubts about the longterm value of throwing commissioners in jail, although such actions would certainly have a notable short-term effect. The threat of a fine, on the other hand, particularly if the threat is carried out, may go a long way towards motivating administrators because the result of inaction will be to have large sums of money drained out of the state treasury into some unknown federal pot. Court-ordered prison closure has come to be seen by many as an idle threat, a step with so many ramifications that not even a federal judge will take it. A fine based on contempt may be far easier to impose and far more likely to produce results.

If the courts are moving away from policing corrections, how is corrections going to police itself, or what is going to replace the court? Corrections over the years has not demonstrated a very good track record of policing itself. Someone has to move in, at least to keep these problems in the public eye, and the corrections industry itself must be willing to identify and speak out about its problems.

I have a couple of comments about politics and then I'll close. Legislatures (to second what Jim Jacobs said earlier) are not always the unfeeling or insensitive bodies that academics and the executive branch sometimes portray them as being. Let me relate the experience we've had over the last several years in Washington. Our experience covers three political administrations in which the legislature has supported alternatives to corrections (sometimes in spite of disastrous release decisions), including work release and furlough, and intensive probation/parole programs. Our legislature has passed an emergency release act in one session and turned around in the next session and amended it so as to make it stronger.[14] In the last several years, the legislature has appropriated over $140 million for new prison construction or major prison renovation. This is in addition to over $170 million for major jail construction and renovation during the same period.[15]

The legislature passed a determinate sentencing scheme, patterned after Minnesota's, that ties itself specifically to capacity.[16] The legislature ap-

13. Newman v. Alabama, 683 F.2d 1312 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 1773 (1983).

14. Prison Overcrowding Reform Act of 1982, WASH. REV. CODE § 9.95.380, 1983 Wash. Legis. Serv. Ch. 162 (West).

15. While this may not sound large to Texans, New Yorkers, or Californians, it remains a large sum to Washingtonians.

16. Sentencing Reform Act of 1981, WASH. REV. CODE §§ 9.94A, 9.94A.040(6).

proved minimum terms recommended by the sentencing commission, and while they increased terms for violent offenses, they also decreased terms for nonviolent offenses; the new legislation does not reflect the overwhelming "lock 'em up" emotionalism ascribed to other legislatures.[17] According to projections, Washington's new determinate sentencing plan may actually bring about a reduction in the prison population over the next several years. All of this is overlaid on a state where there already was a high probation rate (75 to 80%) and where actual prison terms were not excessively long compared to other states.

Legislative responses to the challenges of crowding and sentencing have yet to rid Washington of an overcrowded prison system, but they certainly belie the idea that legislatures always refuse to take action to remedy the problem. Political remedies can be useful and responsive if politicians are educated to corrections problems and are recognized as having a critical role to play in the solution to those problems. Such education cannot be limited to one legislative session nor to just one or two legislators. It must be a continuing effort and it must strive to reach all the legislative movers and shakers. Political solutions will not bring a corrections agency everything it seeks but it will help create the sort of cooperative partnership between the legislative and executive branches of government that our state constitutions envision and it will help fill any void left if and when the courts pull away from deciding corrections issues.

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17. 1983 Wash. Legis. Serv. Ch. 115 (West).